Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

PEOPLES BANK OF BLOOMINGTON,
as Successor Trustee of trusts created by the
Will of George F. Dick, Jr., deceased,
and as Trustee of trusts created by the
Will of Althea M. Dick, deceased,
Plaintiff,
v.
GEORGE F. DICK III, et al., Defendants;

HELEN A. DICK,
Petitioner-Appellant,
v.
PEOPLES BANK OF BLOOMINGTON,
Respondent-Appellee.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fourth District

PETITION FOR WRIT OF CERTIORARI
(Separate Appendix filed)

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the April 16, 1997 decision of the Illinois appellate court is inconsistent with federal law as to due process and in conflict with relevant decisions of the United States Supreme Court and the Illinois reviewing courts---where the record shows a February 21, 1984 order finding that beneficiary Helen A. Dick was not a party to, and could not submit facts or argument pertaining to, any of the counts (Counts I-IV) then remaining---and where uncontroverted facts of her June 1996 petition to vacate show that plaintiff Peoples Bank of Bloomington had actual notice of the Will of George F. Dick, Jr. at all times after September 1955 and had participated with defendant George F. Dick III in acts set forth in said Counts I-IV (including a 1959 transfer of shares of the Capital Stock of said Bank to said George III, a transfer which a March 2, 1984 partial summary judgment order stated was "violative of the limiting provisions of" said Will).

II.

Whether the 1972 transfer of shares of the Capital Stock of the Peoples Bank of Bloomington to the use and beneficial enjoyment of a one-bank holding company was wrongful conversion and/or created constructive trusts (e.g., due to said holding company's subsequent purchase of a federal bank, First National Bank of Normal, with funds derived from the operation of said Peoples Bank of Bloomington).

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OPINION BELOW

The April 16, 1997 decision of the Illinois appellate court, the judgment herein sought to be reviewed, is an unpublished order. (A copy is at page 1 of the Appendix.)

JURISDICTION

The order sought to be reviewed was entered by the Illinois appellate court on April 16, 1997. Helen A. Dick's petition for leave to appeal to the Illinois supreme court was denied October 1, 1997.

Her Affidavit of Intent (to apply to the United States Supreme Court for a writ of certiorari) was filed and served on October 28, 1997, by next-day express mail. The jurisdiction of this Court is invoked under 28 USC § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

PERTINENT TEXT OF STATUTES CITED

735 ILCS 5/2-1401. Relief from judgments.

> "(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis * * * are abolished.
>
> (b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. * * *
>
> * * * * *
>
> (f) Nothing contained in this Section affects any existing right to relief from a void order or judgment or to employ any existing method to procure that relief."

735 ILCS 5/13-215. Fraudulent concealment.

> "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards."

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STATEMENT OF THE CASE

I.
BACKGROUND FACTS

Testators George F. Dick, Jr. (an attorney) and Althea M. Dick (born Helen Althea Marsh) had three natural children: Helen Dick (who had no middle name or initial); Eleanor Dick; and George F. Dick III. All three (born, respectively, in 1911, 1912 and 1919) died in 1992. Beneficiary Helen A. Dick (born in 1932, during Eleanor's first marriage) was named for her maternal grandmother ("Helen Althea"); and was legally adopted by her said maternal grandparents when she was three years old, in connection with Eleanor's first divorce. Eleanor soon remarried (becoming Eleanor Lyon) and Helen A. Dick continued to live with and be parented by said George F. Dick, Jr. and Althea M. Dick. Helen A. married, divorced, and resumed the use of her maiden name after her children were grown.

George F. Dick, Jr. died May 8, 1955. George III (an attorney) and Althea M. Dick were Co-Executors of George Jr.'s will, a will which gave Althea "full possession and sole management" of all of her late husband's property "for as long as she shall live." One of the Bank's attorneys has admitted that said will gave Althea the right to sell "any of the property for her own purposes" (Sept. 1, 1994 transcript, Vol. XXI, p. 17 at 13-18 and p. 18 at 15-16).

The only restriction on Althea as to her late husband's property was as follows:

> "No interest under this Will shall be transferable or assignable by any beneficiary (except by the Wills of Helen Dick and Helen A. Dick as provided above) or subject to the claims of their creditors * * *."

Where Althea had unlimited power/right to sell any or all property of her late husband's estate (including but

not limited to any or all shares of the Capital Stock of the Peoples Bank of Bloomington) and unlimited power/right to consume sales proceeds (e.g., without having to first exhaust her own assets), the trust created by George Jr.'s will could not be funded until after Althea's death. Furthermore, it could not be determined until after Althea's death whether there were or would be any shares of the Capital Stock of the Peoples Bank of Bloomington remaining in said estate.

George Jr.'s said will provided for his estate to remain open until after Althea's death and referred to George III's capacity as "the remaining Executor" after Althea's death. However, George III obtained an order of discharge in July 1956.

A copy of the will of George F. Dick, Jr. (dated July 14, 1953) is at Appendix page 62. The only trust established by George Jr.'s said will was f/b/o the aforesaid three daughters (including Helen A. Dick) and was to terminate upon the death of Eleanor (who died January 12, 1992). In his said will, Attorney George F. Dick, Jr. referred to mutual provisions of Althea's will as follows:

> "My wife, Althea M. Dick, in her Will has established a Trust similar to the one I have established here and I authorize the Trustee in each of said Wills to consolidate the Trust in my Will and my wife's Will and to operate it as one Trust Estate."

Althea died October 10, 1976. Having obtained the aforesaid order of discharge in July 1956, George III did not file a final report in 1976 as to George Jr.'s estate. Instead, George III immediately began acting as testamentary trustee of the aforesaid trust and, simultaneously, began acting as executor of Althea's estate.

II.

On or about December 26, 1978, Peoples Bank

of Bloomington became trustee. The Bank administered these trusts for almost four years without filing an action to compel accountings from George III or for will construction.

III.
FACTS AS TO THIS CASE IN 1982-1984

On September 22, 1982, the Bank commenced this case by filing a pleading entitled "Construction of Testamentary Trusts" (Vol. I, C-19, Appendix page 49). Helen A. Dick was a party to Counts V-VII.

Counts V and VII of the Bank's pleading were dismissed by the court on January 18, 1983 (Record Sheet entry of even date, Vol. I, C-3). Count VI (a count praying only for discovery) was voluntarily dismissed by the Bank on February 15, 1984 (Record Sheet entry of even date, Vol. I, C-9).

Circuit Judge Baner entered a February 21, 1984 order finding, among other things, that beneficiary Helen A. Dick had filed affidavits (e.g., in support of the Bank's motion for partial summary judgment), that she was not a party to any of the counts remaining (i.e., Counts I-IV) and that she could not submit facts or present argument as to then-pending motions for summary judgment. (A copy of said order, Vol. VII, C-1564, is at Appendix page 20.)

On March 2, 1984, Judge Baner entered a partial summary judgment order finding inter alia that (as to the 1959 transfer of 80 shares of the Capital Stock of the plaintiff Bank to George F. Dick III) any transfer of interest in shares by Althea M. Dick prior to her death was violative of the limiting provisions of the will of George F. Dick, Jr.---and finding that said George F. Dick III should account for all shares from the date of the March 31, 1959 transfer to the date (October 10, 1976) of Althea's death. (A copy of said March 2, 1984 order, Vol. VII, C-1583, is at Appendix page 17.)

Before any accounting was submitted, and on the date scheduled for a bench trial to begin, the Bank and George III filed a Stipulation alleging that the then-pending claims of said parties had been "fully compromised and settled" and that the cause should be dismissed as to said parties (Vol. VII, C-1617, Appendix page 15). Judge Baner entered the attached (proposed) order that same date (March 14, 1984).

The record shows that the settlement agreement was not filed with the court; that Judge Baner took no part in the settlement; and that he did not review or approve it. His Record Sheet entry of March 14, 1984 (Vol. I, C-12) reads in pertinent part (emphasis added):

> "Cause comes on for hearing on B.T. [bench trial]. Counsel for Plaintiff and for Defendant present Dismissal Stipulation re pending issues. Beneficiary Helen A. Dick objects. Argument heard re settlement without beneficiary's approval. Authorities reviewed and Court offers to consider approval of settlement if requested by Plaintiff Trustee. Not Requested. Case dismissed Per Stipulation over objection of Helen A. Dick. * * *."

IV.

HELEN A. DICK FILED A 1994 PETITION PRAYING FOR THE VACATION ONLY OF SAID MARCH 14, 1984 ORDER WHICH HAD PERMITTED DISMISSAL PER THE ATTACHED STIPULATION.

Said petition (Vol. XVII, C-3793, pertinent portions are at Appendix page 43) focused on what she alleged was an improper settlement for an insufficient amount.. Because she was not attempting to vacate the aforesaid February 21, 1984 order as to her lack of standing to submit facts or argument as to the (underlying) Counts I-IV causes of action, she failed to show a (principal) cause of action to vacate any order.

V.

FACTS AS TO THIS 1996 ACTION

At paragraphs 4, 5 and 6 in Section "B" of beneficiary Helen A. Dick's June 13, 1996 petition to vacate (Vol. XX, C-4225, Appendix page 21), she describes three (3) orders entered by Judge Baner in 1984. At paragraph 7 of said Section "B", she states inter alia that said three orders are void.

> "4. On February 21, 1984, Judge Baner entered an order * * * finding, among other things, that Helen A. Dick was not a party to any of the counts then remaining (Counts I, II, III and IV) and that she was not permitted to submit factual matters or present argument as to pending Summary Judgment Motions.
>
> 5. On March 2, 1984, Judge Baner entered an order * * * as to some of the substantial issues. As to Count I, it was determined by Judge Baner that the transfer of shares to George F. Dick III prior to Althea M. Dick's death violated the provisions of the Will of George F. Dick, Jr. Said order directed George III to account for all shares from March 31, 1959, the date of the transfer of shares to George III, through October 10, 1976, the day of Althea's death. Neither of the parties (i.e. the Bank and George III) appealed from said order.
>
> 6. On March 14, 1984, the date that had been scheduled * * * for a two-day bench trial to begin, counsel for the Bank and for George F. Dick III presented a dismissal stipulation to Judge Baner "re pending issues" (Record Sheet entry of March 14, 19840 and Judge Baner entered the Order attached to said stipulation * * *.
>
> 7. Through no fault or negligence on the part of beneficiary Helen A. Dick, the

> aforesaid orders were erroneously entered, are void, and should be set aside and vacated (in whole or in part) as to her interests. * * *."

Her said June 1996 petition (Vol. XX, C-4225, Appendix page 21) prays for the vacation of each 1982-1984 order and/or finding as to Counts I, II, III and IV of the trustee Bank's September 1982 pleading (Vol. I, C-19, Appendix page 49) that was against her interests, "including but not limited to Judge Baner's March 2, 1984 finding in favor of George F. Dick III as to the issue of remainder distribution of shares." She also prays, among other things, that she be brought in as party plaintiff to said Counts I-IV and that the Bank be realigned as party defendant to said Counts I-IV.

On June 27, 1996, Judge Baner entered a docket order (Vol. I, C-17 B, Appendix page 11) ordering Helen A. Dick to file and serve a written specification as to the date of each order challenged as void.

Her resulting "Specification" was filed July 2, 1996 (Vol. XX, C-4259, Appendix page 41), stating (among other things) that the aforesaid orders of February 21, 1984; march 2, 1984 and March 14, 1984 were the subject of her June 13, 1996 petition to vacate. In her said "Stipulation," Helen A. Dick also stated, among other things:

> "Said orders are described with greater particularity at pages 4-5 (paragraphs 4 through 6), page 9 (paragraphs 9 and 10) and page 17 (paragraph D of the prayer for relief) of said June 13, 1996 petition."

[Said paragraphs of the June 1996 petition are, respectively, at pages 25, 29 and 38 of the Appendix.]

On August 1, 1996, Judge Baner entered a docket order (Vol. I, C-17 D, Appendix page 10) by which he, among other things, allowed Helen A. Dick's motion for leave to correct typographical errors.

VI.
FACTS AS TO WHEN AND HOW THE FEDERAL QUESTION OF DUE PROCESS WAS RAISED

Fact pleading, in contrast to notice pleading, is required in Illinois. Adkins v. Sarah Bush Lincoln Health Ctr. 129 Ill.2d 497, 518 (1989). The federal question of due process was raised first in the title of Helen A. Dick's June 1996 "Verified Petition to Vacate (as to Helen A. Dick's Interests) Orders Which Were and Are Void Because of the Trustee Bank's Failure to See that All Necessary Parties Were Before the Court as to Counts I, II, III and IV."

The due process question was further raised at paragraphs 6 and 7 of her said June 1996 petition to vacate (Vol. XX, C-4225, Appendix page 21), wherein she pleaded facts as to when and how she learned that she had been denied due process and that she had this cause of action (to vacate, to be brought in as party plaintiff and for the Bank to be realigned as party defendant) which the Bank (her trustee) had concealed from her.

> "6. The trustee Bank's acts in filing and in serving its September 1982 7-count pleading (Vol. I, C-19) were overt acts by which the trustee Bank represented (to the court and to beneficiary Helen A. Dick) that said Helen A. Dick had been made a party to all counts to which she was a necessary party.
>
> 7. As set forth in her supporting affidavit (Exhibit "A" attached hereto):
>
> (a) Helen A. Dick did not know or discover until October 1995 (while preparing a petition for leave to appeal to the Illinois supreme court) that it is a plaintiff's duty (in the instant case, the trustee Bank's duty) to see and to know that all necessary parties are before the court or the orders obtained will not be binding.

Hopkins v. Roseclare Lead Co. 72 Ill. 373, 378 (1874).

(b) Helen A. Dick did not know or discover until preparing a petition for writ of certiorari, in December 1995, that due process requires more than merely being served with a pleading. Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. U.S. Const. Amend. 14. Logan v. Zimmerman Brush Co. 455 U.S. 422, 71 L.Ed.2d 265, 279 (1982). Illinois Const. of 1970, Art. I, sec. 2.

(c) * * *

(d) Helen A. Dick did not know or discover until May 1996, that each order entered as to Counts I, II, III and IV of the Bank's 1982-1984 action is void for the following reasons. Facts which were not before Judge Baner would, had they been before him, have revealed that each said count involved a controversy between the trustee Bank and the beneficiaries (including Helen A. Dick). Although a trustee may ordinarily represent the interests of beneficiaries, the beneficiary is a necessary party if a complete determination of the controversy cannot be had unless he is made a party, as where a suit involves a controversy between the trustee and the beneficiaries. Restatement (2d) Trusts § 280 (i), (1959). The requirement of joinder of necessary parties is absolute and inflexible. Adoption of Ledbetter 125 Ill.App.3d 306, 308 (1984). If the lack of parties is brought to the attention of the court, whether one of original or appellate jurisdiction, the court should not proceed further in the matter until the omission has been corrected, even though no objection is

made by any party litigant. Giese v. Terry 382 Ill. 34, 41 (1943)."

Section "C" of said June 1996 petition to vacate (Vol. XX, C-4225; said Section is at Appendix page 26) begins: "The Following Maters of Fact Were Not Before the Court in the Bank's Action. Such Facts, Had They Been Before the Court, Would have Prevented the Entry of the Aforesaid 1984 Orders by Showing that Counts I, II, III and IV Each Involved a Controversy Between the Trustee Bank and the Beneficiaries (including Helen A. Dick."

VII.

FACTS AS TO WHEN AND HOW THE FEDERAL QUESTION OF CONVERSION WAS RAISED

Facts in the 1996 petition to vacate (Vol. XX, C-4225, Appendix page 21) raised the question of conversion and showed that this is a federal question, as follows:

> "6. Each of the aforesaid Stock Holders Ledger pages bearing any 1972 entry also bears the words:
>
> 'PBB SHARES CONVERTED TO PEOPLES MID-ILLINOIS CORP.'
>
> thus showing that all shares of the Capital Stock of the Peoples Bank of Bloomington (and its Stock Holders Ledger) including but not limited to shares which were property of the estate of George F. Dick, Jr. (e.g., the shares then still registered to Althea as life tenant and 2,400 of the shares registered to George III) were converted on or about June 30, 1972 and/or July 3, 1972 to the use and beneficial enjoyment of said Peoples Mid-Illinois Corporation."

Said paragraph 6 is at Appendix page 29.

> "1. In or about 1985, the aforesaid one-bank holding company (Peoples Mid-Illinois

> Corporation, a Delaware corporation) purchased an additional bank (First National Bank of Normal) with funds derived from the operation of Peoples Bank of Bloomington. * * *
>
> 2. On or about March 1, 1995, Commerce Bancshares, Inc. (a Missouri corporation) obtained possession and control of "The Peoples Bank," subsequently changing the name of said bank to "Commerce Bank. Attached hereto (as Exhibit "B" are copies of pages 1, 33, 11, A-1 and A-40 of Securities and Exchange Commission Form 10-K, as published in the 1995 annual report of said Commerce Bancshares, Inc. * * *."

Said paragraphs 1 and 2 are at Appendix page 34.

[The aforesaid Exhibit "B" shows, among other things, Commerce Bancshare's representation that as of March 1, 1996, it owned or controlled "substantially all of the outstanding capital stock" of 14 national banking associations (located in Missouri, Illinois, Kansas and Nebraska), in addition to various state banks, a credit card bank, and "several non-banking subsidiaries" which are engaged in (among other things) owning real estate and leasing the same to the Company's banking subsidiaries. "The Company also owns second tier holding companies which are the direct owners of several of the above mentioned banks."]

VIII.
THE FEDERAL QUESTIONS OF DUE PROCESS AND CONVERSION WERE PASSED ON BY THE TRIAL AND APPELLATE COURTS, NOT IN EXPRESS TERMS, BUT IN SUBSTANCE AND EFFECT.

Circuit Judge Caisley heard the Bank's motion for involuntary dismissal on August 30, 1996 and entered a docket order stating (among other things)

"that the judgments of this court and of the Fourth District Appellate Court are not void and that this court and the Fourth District Appellate Court had jurisdiction to hear and determine the issues raised therein; and that the petition filed June 13, 1996 is an impermissible collateral attack upon a final judgment." (Said docket order is at Vol. I, C-17 E, Appendix page 8.)

The written Judgment Order submitted by the Bank and entered by Judge Caisley on September 11, 1996 (Vol. XX, C-4355, Appendix page 6) allowed the Bank's Motion for Involuntary Dismissal and twice referred to Helen A. Dick's petition by its full title: "Verified Petition to Vacate (as to Helen A. Dick's Interests) Orders Which were and are Void Because of the Trustee Bank's Failure to see that All Necessary Parties were Before the Court as to Counts I, II, III and IV." Her said June 13, 1996 petition was dismissed with prejudice. She was assessed $300.00 payable to the Bank for attorney fees and permanently enjoined from initiating future litigation against the Bank (or against George III or his heirs).

The order from which Helen A. Dick appeals was entered by the Illinois appellate court on April 16, 1997. A copy of said order is at page 1 of the Appendix.

The appellate court affirmed Circuit Judge Caisley's judgment on grounds (i.e., res judicata and limitations) that do not apply where the orders being attacked are void. The Illinois courts thus apparently found that Helen A. Dick was not a necessary party to the underlying causes of action (i.e., the causes of action represented by the Bank's Counts I-IV) which was, in substance and effect, a finding that (among other things) the 1972 transfers of interest in shares of the Capital Stock of the Bank (which Helen A. Dick alleged was wrongful conversion) had been proper.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I.
PRINCIPLES OF LAW APPLICABLE TO ALL POINTS AND SUBPOINTS

A.

Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. U.S. Const. Amend. 14. Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265 (1982). [The foregoing principle of law was before the appellate court at paragraph 7(b) of Helen A. Dick's June 1996 petition to vacate, Vol. XX, C-4225, Appendix page 21.]

Under both the Federal and Illinois Constitutions, the due process clause requires "at a minimum, that a party have a full and fair opportunity to litigate an issue before he is bound by that issue's resolution." CIPS v. Allianz Underwriters, 158 Ill.2d 218, 225 (1994).

Although a trustee may ordinarily represent the interests of beneficiaries, the beneficiary is a necessary party if a complete determination of the controversy cannot be had unless he is made a party, as where a suit involves a controversy between the trustee and the beneficiaries. Restatement (2d) of Trusts § 280 (i), (1959). [This principle of law was before the appellate court at paragraph 7 (d) of said petition to vacate.]

It is a plaintiff's duty to see and to know that all necessary parties are before the court or the orders obtained will not be binding. Hopkins v. Roseclare Lead Co., 72 Ill. 373, 378 (1874). [This principle of law was before the appellate court at paragraph 7 (a) of the aforesaid petition to vacate, Vol. XX, C-4225, Appendix page 21.]

B.

Illinois courts are expected to follow the doctrine of stare decisis. Pasquale v. Speed Products Engineering, 166 Ill.2d 337, 349 (1995). Maki v. Frelk, 40 Ill.2d 193, 196 (1968).

C.

A motion to dismiss admits all well-pleaded facts and any inferences which may be drawn from those facts. Quake Construction v. American Airlines, 141 Ill.2d 281, 289 (1990). Whenever the granting of a motion to dismiss is reviewed, all well-pleaded facts alleged in the complaint are taken as true. Wheeler v. Caterpillar Tractor, 108 Ill.2d 502, 505-506 (1985).

II.

THE DECISION OF THE ILLINOIS APPELLATE COURT IS IN CONFLICT WITH FEDERAL LAW AS TO DUE PROCESS AND IN CONFLICT WITH RELEVANT OPINIONS OF THE UNITED STATES SUPREME COURT AND THE REVIEWING COURTS OF ILLINOIS.

As shown hereinbelow, there are no state grounds to support the Illinois appellate court's order.

A.

TAKEN AS TRUE, UNCONTROVERTED FACTS SET FORTH IN SECTION "C" OF THE JUNE 1996 PETITION TO VACATE SHOW THAT THE BANK PARTICIPATED IN 1959 ET SEQ. ACTS SET FORTH IN COUNTS I-IV OF THE BANK'S 1982 PLEADING.

Because a conflict existed between interests of the Bank and interests of beneficiary Helen A. Dick, she was a necessary party to said Counts I-IV.

Said June 1996 petition to vacate (Vol. XX, C-4225) begins at Appendix page 21. It is a verified pleading supported by an attached affidavit and a

separate affidavit (Vol. XX, C-4349). The Bank did not file any counter-affidavit. Said Section "C" (18 paragraphs) begins at Appendix page 26.

As set forth at paragraph 1 of said Section "C," the Exhibits referred to (e.g., a Stock Certificate, Stock Holders Ledger pages, Minutes) were merely marked for identification during a pre-trial conference, thus were not "before" the court during the Bank's action. The Plaintiff Bank's said exhibits became a supplement to the record (Vol. XV, C-3133 et seq.) when Helen A. Dick appealed the dismissal of a counterclaim/cross-claim she had filed against George III.

Certain of the Plaintiff Bank's said exhibits are described at paragraphs 2 through 13 of the aforesaid Section "C" of the June 1996 petition to vacate (Vol. XX, C-4225, Appendix page 21). Copies of same are in the Appendix at page 80 et seq. A copy of the Will of George F. Dick, Jr. is at Appendix page 63. A copy of Bank's summary of loans which were the subject of its Count III is at Appendix page 77.

1.

<u>As to the Bank's Counts I-IV</u>

Counts I, II and IV of the Bank's 1982 pleading (Vol. I, C-19, Appendix page 49) pertained to 1959 et seq. stock transfers (and subsequent payments of shares), including the 1959 transfer to George III of 80 of the 91 shares of the Capital Stock of the Peoples Bank of Bloomington which had been owned by George F. Dick, Jr. at the time of his death.

Facts set forth and Exhibits referred to at paragraphs 2-10 of the aforesaid Section "C" (said Section begins at Appendix page 26) of Helen A. Dick's June 1996 petition to vacate show that at all times after September 1955, the Bank had actual notice of the Will of George F. Dick, Jr. (on Stock Certificates and in the Bank's Stock Holders Ledger). The Bank knew when

filing its 1982 complaint (and when marking said documents as Exhibits during the pre-trial conference of February 22, 1984) that the Bank had had actual notice of the Will of George F. Dick, Jr. when it made the aforesaid transfers (and subsequent transfers, payments and deliveries of shares and/or cash dividends). Said banking corporation also knew that notice of a will gives a corporation the duty, when asked to transfer shares, to refuse to make any transfer, payment and/or delivery of shares (and any subsequent transfer, payment and/or delivery of shares) that is violative of the provisions of such will. Seymour v. National Biscuit Co., 107 F. 2d 58, 62 (3d Cir. 1939). Daily v. Universal Oil Products Co., 76 F.Supp. 349, 371 (N.D. Ill. 1947). [The foregoing principle of law is set forth at paragraph 2 of Section "C" of Helen A. Dick's June 1996 petition to vacate; said Section "C" begins at Appendix page 26.]

The Bank attached a copy of the Will of George F. Dick, Jr. as Exhibit "A" to its 1982 pleading (Vol. I, C-19, Appendix page 49) At the end of paragraph 6 in Count I of its said pleading, the Bank quoted the following provision of the Will of George F. Dick, Jr.:

> "No interest under this Will shall be transferable or assignable by any beneficiary (except by the Wills of Helen Dick and Helen A. Dick as provided above) or subject to the claims of their creditors * * * ."

As a bank which holds itself out to the public for hire as a trustee, the Bank knows the effect of a will's spendthrift provision and has all along known that the 1959 et seq. transfers of interest (in shares) set forth in Counts I, II, and IV of its aforesaid September 1982 pleading are void because prohibited by the spendthrift provision of said Will of George F. Dick, Jr. McKeown v. Pridmore, 310 Ill.App. 634, 645-646 (1941).

1 (a).

Specifically as to the 1972 Transfer/Conversion

Paragraph 8 of Count I of the Bank's 1982 pleading (Vol. I, C-19, Appendix page 49) was a paragraph common also to its aforesaid Counts II and IV. The Bank's said paragraph reads as follows:

> "On or about August 1, 1967, there was a 30 for 1 split of plaintiff's stock, and on or about June 3, 1972 [sic], all of plaintiff's shares (except directors' qualifying shares) were exchanged on a 1 for 1 basis for shares of Peoples Mid-Illinois Corporation, a Delaware corporation and a one bank holding company, and on or about April 17, 1978, there was a 3 for 1 stock split of the shares of Peoples Mid-Illinois Corporation."

As set forth in Section "C" of Helen A. Dick's June 1996 petition to vacate:

> "6. Each of the aforesaid Stock Holders Ledger pages bearing any 1972 entry also bears the words:
>
> "PBB SHARES CONVERTED TO
> PEOPLES MID-ILLINOIS CORP."
>
> thus showing that all shares of the Capital Stock of the Peoples Bank of Bloomington (and its Stock Holders Ledger), including but not limited to shares which were property of the estate of George F. Dick, Jr. * * * were converted on or about June 30, 1972 and/or July 3, 1972 to the use and beneficial enjoyment of said Peoples Mid-Illinois Corporation.
>
> 7. As set forth in Helen A. Dick's affidavit (Exhibit "A" hereto), George F. Dick III (who died November 20, 1992) was a director of Peoples Mid-Illinois Corporation in January 1972 (if not before) and never resigned as a director of said holding company. George

> III thus was both a director of the Bank and a director of the one-bank holding company at the time of the aforesaid mid-1972 conversion.
>
> 8. The foregoing facts, had they been before the court during the Bank's 1982-1984 action, would have shown the court: (a) that the trustee Bank was not independent from defendant George F. Dick III because he was still a director of the one-bank holding company which governed the Bank's affairs; (b) that Counts I, II and IV each involved a conflict between the interests of the beneficiaries (including Helen A. Dick) and the interests of the Bank and/or said one-bank holding company."

At paragraph 10 of said Section "C," Helen A. Dick cited Sadacca v. Monhart, 128 Ill.App.3d 250, 255 (1984). The reviewing court in Sadacca (citing three opinions of the Illinois supreme court) stated, among other things, that "a constructive trust will be imposed to prevent a person [unfairly] holding title to property to profit from his wrong or be unjustly enriched by retaining [it]."

At 256-257 of Sadacca, the court (citing authorities, including a 1933 opinion of the Illinois supreme court) also stated:

> "When a person's property has been wrongfully appropriated and converted into a different form, equity impresses a constructive trust upon the new form or species of property * * * as long as it can be followed and identified into whosesoever hands it may come * * *."

The reviewing court added that even if the person receiving the benefit is innocent of collusion, if he accepts the property, "he adopts the means by which it was procured."

2.

As to the Bank's Count III

Count III of the Bank's 1982 pleading (Vol. I, C-19, Appendix page 49) pertained to George III's making loans to himself (totaling $112,900), beginning in June 1971, from funds which were property of the estate of George F. Dick, Jr.

Paragraphs 11-15 of the aforesaid Section "C" of Helen A. Dick's June 1996 petition to vacate set forth facts and refer to Exhibits (i.e., bank statements and a canceled check) showing, among other things, that Peoples Bank of Bloomington had failed to inquire into George III's authority to deposit and/or to withdraw estate funds and/or to hold himself out as a trustee during Althea's lifetime. A copy of the will of George F. Dick, Jr. was Exhibit "A" to the Bank's pleading (Vol. I, C-19, Appendix page 49). Said will contains the following terms and provisions which were quoted by Helen A. Dick at paragraph 11 of said Section "C" of her June 1996 petition to vacate. (Said Section "C" begins at Appendix page 26.)

> "I hereby give a life estate in all of my property to my wife, Althea M. Dick, she to have the full possession and sole management thereof as long as she shall live."

The Bank ought not to have permitted George III to open or maintain accounts in a purported capacity as fiduciary and/or trustee without inquiring into his authority to do so. The Bank ought not to have permitted George III to write checks to himself and his then-wife Marilyn with funds belonging to said estate. Furthermore, the Bank ought not to have permitted one of its employees (Ilene R. Beach) to write a $3,000 check payable to George F. Dick III on one of said accounts (as set forth at paragraph 13 within said Section "C" of Helen A. Dick's June 1996 petition to vacate; said Section "C" begins at Appendix page 26).

If a trustee deposits trust funds in a bank, the bank is liable for participation in the breach of trust in receiving or in permitting the trustee to withdraw the trust funds, where the trustee commits a breach of trust in making the deposit or withdrawal, if the bank received the deposit or permitted the withdrawal with notice of the breach of trust. Restatement (2d) of Trusts § 324 (1959). [This principle of law is set forth at paragraph 12 of said Section "C" of the June 1996 petition to vacate.]

3.

As a bank which holds itself out to the public for hire as a trustee, the Bank knew that facts which were not before Judge Baner would, had they been before him, have revealed that each said Count (I-IV) involved a controversy between the Bank and beneficiary Helen A. Dick, thus the Bank knew that she was a necessary party to said counts. Restatement (2d) of Trusts § 280 (i), (1959). [This principle of law is set forth within paragraph 7 (d) of Helen A. Dick's June 1996 petition to vacate (Vol. XX, C-4225); said paragraph 7 (d) is at Appendix page 24.]

By failing to name Helen A. Dick as a party to said Counts I-IV, the Bank insured that she was denied due process as to such causes of action.

As a bank which holds itself out to the public for hire as a trustee, the Bank has all along known that the principle of caveat emptor does not apply to fiduciary relationships. The trustee must not only be truthful in all his representations, he must not remain silent concerning any matter that would throw light on the trust estate. 90 C.J.S. Trusts, § 247, p. 240. The beneficiaries must not only have been acquainted with the facts, they must know of their rights and have been apprised of the law, and of how the facts would be dealt with by a court of equity. 76 Am Jur 2d Trusts, § 357,

p. 359. A trustee's failure to disclose amounts to fraudulent concealment. Chicago Park District v. Kenroy, 78 Ill.2d 555, 562 (1980). [The foregoing principles of law are set forth within paragraph 3 of Helen A. Dick's June 1996 petition to vacate, Vol. XX, C-4225, Appendix page 21.]

4.

Necessary parties are entitled to participate in the litigation of all questions affecting their interests and a decree is binding only on those beneficiaries who were then before the court. Oglesby v. Springfield Marine Bank, 385 Ill. 414, 430 (1944). The court has the duty to vacate a void order and thus expunge void acts from its records. People v. Magnus, 262 Ill.App.3d 362 (1994).

B.

COLLATERAL ESTOPPEL APPLIES AGAINST THE BANK AS TO SOME ISSUES.

Collateral estoppel applies against the Bank as to each issue that facts in her June 1996 petition now show were decided not only against George F. Dick III's interests, but also against the interests of the Bank. Housing Authority v. YMCA, 101 Ill.2d 246, 252 (1984). Such issues are set forth in Judge Baner's March 2, 1984 partial summary judgment order (Vol. VII, C-1583, Appendix page 17).

Count I of the Bank's 1982 pleading (Vol. I, C-19, Appendix page 49) set forth 1959 et seq. transfers of shares of the Capital Stock of the Peoples Bank of Bloomington. As set forth in his said March 2, 1984 order, Judge Baner found, among other things, that:

> "[A]ny assignment of interest in shares by Althea Dick prior to her death was violative of the limiting provisions of the Will of George F. Dick, Jr. * * * The defenses of res

> adjudicata, estoppel, laches or statute of limitation[s] are not established.
>
> The prayer for accounting is allowed as it relates to the period of March 31, 1959 to October 10, 1976 and as to all shares during such period. Ruling is reserved as to remaining issues."

Count II of the Bank's said 1982 pleading set forth facts as to a 1972 transaction by which Helen Dick borrowed money from the Bank to purchase holding company stock that was estate property and by which George III then purchased said shares from said Helen Dick (using liquid assets of the George F. Dick, Jr. estate), with the result that the holding company (Peoples Mid-Illinois Corp.) registered the shares in George III's name as a purported "Trustee" during the lifetime of Althea M. Dick (who died in October 1976). Judge Baner's March 2, 1982 order denied both the Bank and George III's motions for summary judgment.

As to Count III (which set forth loans George III made to himself from liquid assets of George Jr.'s estate during the lifetime of Althea M. Dick), Judge Baner found that the burden of proof had shifted to the defendant and that defenses of laches and res judicata were not established.

Count IV pertained to George III's sale of holding company (Peoples Mid-Illinois Corp.) stock out of the estate of Althea M. Dick to said holding company while George III was both executor of said estate and Chairman of the Board of said purchasing corporation (Peoples Mid-Illinois Corp.). Judge Baner found, among other things, that laches and res judicata had not been established.

C.

THE JUNE 1996 PETITION TO VACATE IS NOT BARRED BY RES JUDICATA.

Res judicata does not apply where a judgment or order is void. Allcock v. Allcock, 107 Ill.App.3d 150, 153 (1982). As shown above, the 1984 orders are void because the Bank failed to make Helen A. Dick a party to the aforesaid Counts I-IV.

Furthermore, at least two of the elements of res judicata are missing from the instant matter.

In Leow v. A & B Freight, 175 Ill.2d 176, 180 (1997) the Illinois supreme court explained that for res judicata to bar a subsequent action, all three of the following criteria must be met:

> "(1) there must be a final judgment on the merits rendered by a court of competent jurisdiction; (2) there must be an identity of causes of action; and (3) there must be an identity of parties or their privies."

1.

To date, there has not been a final judgment on the merits in this case that was entered by a court of competent jurisdiction.

(a.)

Judge Baner did not have jurisdiction over all necessary parties when he entered the February 21, 1984 et seq. orders as to the Bank's Counts I-IV.

As set forth above, Helen A. Dick was a necessary party to Counts I-IV of the Bank's 1982-1984 action but the circuit court did not have jurisdiction over her when, e.g., Judge Baner entered the February 21, 1984 order finding inter alia that she was not a party to any of the counts then remaining (i.e., said Counts I-IV). As set forth at paragraph 4 in Section "A" of her 1996 petition to vacate (Vol. XX, C-4225, Appendix page 21):

> "4. An order entered without the presence before the court of all necessary

parties is void and may be attacked at any time (Estate of Steinfeld, 158 Ill.2d 1, 12 (1994)) and is binding only on parties who were then before the court. (Oglesby v. Springfield Marine Bank, 385 Ill. 414, 430 (1944)). The court has the duty to vacate a void order and thus expunge void acts from its records. People v. Magnus, 262 Ill.App.3d 362, 365 (1994)."

As set forth at paragraph 7 (a) of said 1996 petition to vacate:

"[I]t is a plaintiff's duty (in the instant case, the trustee Bank's duty) to see and to know that all necessary parties are before the court or the orders obtained will not be binding. Hopkins v. Roseclare Lead Co., 72 Ill. 373, 378 (1874)."

(b.)

Neither Judge Witte nor Judge Caisley had subject-matter jurisdiction when they (respectively) dismissed Helen A. Dick's January 1994 petition (attempting to vacate only Judge Baner's March 14, 1984 order) and dismissed this June 1996 petition to vacate the February 21, 1984 et seq. orders.

In Federal Sign & Signal v. Czubak, 57 Ill.App.3d 176, 178-179 (1978), the reviewing court found that when considering a petition to vacate, the initial inquiry to be made by a court is whether the judgment is void (and that if it is, successive, even identical, petitions can be used to attack it).

Paragraphs 1 and 7 (c) of this June 1996 petition to vacate (Vol. XX, C-4225 Appendix page 21) read as follows:

"1. * * * It is not appropriate for one circuit judge to review the orders of another circuit judge. People ex rel. v. Samuel B. Epstein, Judge, et al., 61 Ill.2d 229, 230-231 (Supervisory order, 1974).

* * *

7. * * * (c) Helen A. Dick did not know or discover until May 1996, that if, for some reason, a matter involving review of a prior order is assigned to a different judge, that judge should find that he does not have jurisdiction and should transfer the case back to the judge who entered the initial order(s). Cruz v. Columbus-Cuneo-Cabrini Medical Ctr., 194 Ill.App.3d 1037, 1039-1040 (1990) and Cruz , 264 Ill.App.3d 633, 636-637 (1994)."

As set forth at page 5 within the foregoing Statement of the Case, Judge Baner was still sitting as a circuit judge and entered docket orders on June 27, 1996 and August 1, 1996. Pursuant to the foregoing principles of law, both the judge (Judge Witte) who dismissed Helen A. Dick's 1994 attempt to vacate (only) Judge Baner's March 14, 1984 order of dismissal and the judge (Judge Caisley) who dismissed her June 1996 petition to, among other things, vacate all or portions of each of Judge Baner's February 21, 1984 orders---ought to have known that the initial inquiry to be made was as to the validity of Judge Baner's orders and that they did not have subject-matter jurisdiction.

4.

There is not an "identity of causes of action."

As shown above, the Bank fraudulently concealed its liability (as to the Count I-IV causes of action) in ways that created a situation whereby the only way beneficiary Helen A. Dick could litigate any of said causes of action against the Bank---was not only to discover that the Bank was liable for those 1959 et seq. acts---but also to discover that she had a cause of action to vacate each 1982-1984 order and/or finding that had been entered against her interests (including Judge Baner's February 21, 1984 order finding inter alia

that she could not submit facts or present argument as to said Counts I-IV); to be brought in as party plaintiff; and for the Bank to be realigned as party defendant.

Writs of error coram nobis have been abolished in Illinois; a petition to vacate a final order or judgment after 30 days must be filed in the same proceeding in which the order or judgment was entered, but is not a continuation thereof. 735 ILCS 5/2-1401.

The record shows that she pleaded the aforesaid principal cause of action in June 1996 (and not before). Her June 1996 petition to vacate is a pleading "under" 735 ILCS 5/2-1401 (f). (A copy of said June 1996 petition, Vol. XX, C-4225, is at Appendix page 21.)

The appellate court acknowledges that Helen A. Dick's June 1996 pleading is a section 2-1401 petition to vacate. The record shows that her only prior attempt to vacate any 1984 order was filed in January 1994 (Vol. XVII, C-3793; pertinent portions are at Appendix page 43), at which time she was attempting to vacate only the March 14, 1984 order by which Judge Baner had permitted dismissal "per stipulation" between the Bank and George III. Because she was not attempting to vacate the aforesaid February 21, 1984 order as to her lack of standing to submit facts or argument as to the (underlying) Count I-IV causes of action, her January 1994 pleading did not avoid the res judicata effect of said February 1984 order and thus failed to state a cause of action "under" 735 ILCS 5/2-1401 (f).

D.

THE JUNE 1996 PETITION TO VACATE IS NOT BARRED BY LIMITATIONS.

1.

As set forth above, the orders in question are void.

As shown above, the Bank (which holds itself out to the public as worthy to be hired as a trustee)

concealed its liability by insuring that beneficiary Helen A. Dick was denied due process as to Counts I-IV of its 1982-1984 action. The orders obtained by the Bank are void because of the Bank's failure to bring necessary party Helen A. Dick before the court as to said counts. Hopkins v. Roseclare Lead Co. 72 Ill. 373, 378 (1874).

Void orders, judgments or decrees can be attacked at any time without regard to the 2-year limitation period in section 72 (now 735 ILCS 5/2-1401). Application of Dickey, 72 Ill.2d 317, 323 (1978). A void judgment or order may be vacated at any time and neither laches nor estoppel apply. Cash v. Maloney, 402 Ill. 528, 536, 84 N.E.2d 390, 394 (1949).

2.

The principal cause of action (to vacate the February 21, 1984 et seq. orders; for Helen A. Dick to be brought in as party plaintiff; and for the Bank to be re-aligned as party defendant) was fraudulently concealed by the trustee Bank.

As set forth at paragraph 6 of Helen A. Dick's June 1996 petition to vacate (Vol. XX, C-4225, Appendix page 21):

> "6. The trustee Bank's acts in filing and in serving its September 1982 7-count pleading (Vol. I, C-19) were overt acts by which the trustee Bank represented (to the court and to beneficiary Helen A. Dick) that said Helen A. Dick had been made a party to all counts to which she was a necessary party."

The Bank named George F. Dick III as the only defendant to the aforesaid Counts I-IV of its said 1982 pleading, thus fraudulently concealing the Bank's liability for having participated in the 1959 acts set forth in said Counts.

During proceedings on November 28, 1994 (which resulted in the dismissal of Helen A. Dick's 1994

petition, by which she attempted to vacate only the March 14, 1984 order which had permitted dismissal "per stipulation" between the Bank and George III), the Bank's attorney referred to her. saying:

> "The case was never that she had no remedy. The case was that she didn't apparently know what her remedy was ***." (Transcript, Vol. XIV, page 34 at line 5.)

A trustee's failure to disclose amounts to fraudulent concealment. Chicago Park District v. Kenroy, 141 Ill.2d 281, 289 (1990).

In Illinois, an action that has been fraudulently concealed may be commenced at any time within 5 years of discovery of said action. 735 ILCS 5/13-215. (The full text of said statute is at page "vii" above.)

Uncontroverted facts as to when and how Helen A. Dick discovered that she had this cause of action (to vacate, to be joined as a party, and for the Bank to be realigned as a defendant) are set forth at paragraphs 6 and 7 of her June 1996 petition to vacate (Vol. XX, C-4225, Appendix page 21) and quoted at page 7 above, where she has set forth facts as to when and how the federal question of due process was raised in the Illinois courts. Said facts show that she did not know or discover that she had this said cause of action until May 1996. This petition to vacate filed approximately one month later (June 13, 1996) is not barred by limitations.

Furthermore, as set forth in the foregoing Statement of the Case, the trust created by George F. Dick, Jr.'s will was to continue until the death of Eleanor (who died January 12, 1992). The trust created by the 1969 will of Althea M. Dick t/b/o Helen A. Dick is still an express active trust. The Bank's wrongful acts affected not only property of George Jr.'s estate but also

the income available to Althea M. Dick. The statute of limitations does not begin to run against an express active trust until the trust is repudiated or the trust relation between the parties comes to an end. Piff v. Berresheim, 405 Ill. 617, 626, 92 N.E.2d 113, 118 (1950).

III.
SPECIFICALLY AS TO CONVERSION

West's Law and Commercial Dictionary in Five Languages (1985) defines "conversion" as follows:

> Conversion. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Any unauthorized act which deprives an owner of his property permanently or for an indefinite time. Unauthorized and wrongful exercise of dominion and control over another's personal property, to exclusion of or inconsistent with rights of owner.

From the time of the mid-1972 transfer of Peoples Bank of Bloomington's Capital Stock to the one-bank holding company (Peoples Mid-Illinois Corporation), dividends on the shares in question have paid to the holding company and used (by the holding company and its management) to pay a second level of management (i.e., holding company management); to purchase a second bank in 1985 (First National Bank of Normal) and to acquire an additional one-bank holding company (Lexington Bancshares, Inc.) and its wholly owned subsidiary, Lexington Bank (also a federal bank), in or about January 1993.

In the instant case, transfer of shares which were property of the estate of George F. Dick, Jr. was

not merely "unauthorized," it was specifically prohibited by the Will of George F. Dick, (a will of which the Bank has had actual notice, as set forth above, at all times since September 19, 1955).

Among the documents marked as the Bank's exhibits during the February 22, 1984 pre-trial conference is Plaintiff's Exhibit #7. It is a copy of a page of the Stock Holders Ledger used by the Bank (and, beginning in mid-1972, used by the holding company, Peoples Mid-Illinois Corporation). A copy of said document is at page 82 of the Appendix and bears the words:

"Althea M. Dick, Life Tenant Under Will
of Geo. F. Dick, Jr., Deceased."

A copy of the Ledger page showing shares Althea owned individually (Plaintiff Bank's Exhibit #8) is at Appendix page 83.

A corporation stands in the relation of a fiduciary to its stockholders. Seymour v. National Biscuit Co., 107 F.2d 58, 63 (3d Cir. 1939). A corporation owes a duty to use reasonable diligence in every case to ascertain whether a requested transfer of stock is duly authorized to be made. Seymour, at 62.

The United States Supreme Court should decide the question of whether the transfer of shares of the Capital Stock of the Bank to the use and beneficial enjoyment of the bank holding company is, as Helen A. Dick alleges, wrongful conversion.

Respectfully submitted,

Helen A. Dick

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